

## IN THE SUPREME COURT OF THE UNITED STATES.

*Jeannie M. Wilson, Administratrix, &c.,*

vs.

*Adam Isenminger and Elmer H. Rogers.*

October Term, 1901.  
No. 193.

## REPLY OF PLAINTIFF IN ERROR.

The defendant's brief skillfully evades the argument and vigorously contends for irrelevant principles which are not denied. It is admitted that arrears of rent for more than twenty-one years prior to 1855 could be barred unless suit was brought within three years. The defendant contends that because plaintiff has not proven a demand or payment of interest for a period of twenty-one years elapsing since 1855, that thereby the principal of the estate, which could not be demanded, can be divested. He cites no authority for this remarkable proposition. He brushes aside, without a suggestion, the tenancy which exists between the plaintiff and defendant. No reason is given for divesting this estate when the plaintiff is legally in possession thereof.

The vice of the Act of 1855 consists in the adoption of a new rule of property which conclusively presumes a release of the estate. The mere fact that a period of time is allowed before the Act becomes effective, cannot validate it. New rules of property cannot be thus imposed. Especially is this true when we have a tenancy subsisting and no right to demand the principal sum invested.

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of the State of New York for the purpose of extirpating the Van Rensselaer and other rents. The bill was referred to a committee of which Samuel J. Tilden was chairman. He wrote an able and elaborate report conclusively showing its unconstitutionality. (See report, dated March 28th, 1846, Assembly Documents No. 156, State of New York.) In criticising the Act he used language closely applicable to this case:—

“It denies the remedy altogether, except on a condition which has no relation to the nature or operation of the remedy, or the validity of the contract, or even, necessarily, to the equities then or now existing between the parties.”

If the defendant's first point can be sustained, then with every change in public policy the incidents of vested rights can be modified if only a period of time is allowed to elapse. Should the Henry George theory of land holding be adopted as the policy of the State, it would be possible to enact that after twenty years' possession there shall be a presumption of a conveyance to the State and thereafter the property shall be divested. Individual holding would come to an end and the policy would be vindicated.

On page 2 of defendant's brief he mildly admits the vice of the Act:—

“When the statute is made retrospective, but it is provided that it shall not go into effect for a reasonable term of years thereafter, the statute, while it does *disadvantage* the owner of a ground rent who had previously failed to make demand for a term of years, does not deprive him of his remedy, and hence does not impair the obligation of the contract.”

“Disadvantage” is not a characteristic term to apply to a plaintiff who has been stripped of her property. She has been deprived of her remedy, but with the consoling thought from the Supreme Court of Pennsylvania that the estate which is still in her possession is unimpaired. If the plaintiff has not been deprived of her remedy because she had previously

failed to make demand for a term of years, then the Supreme Court of Pennsylvania does not mean what it says. This is the ground upon which a recovery is denied and is the very thing of which complaint is made.

The statement on page 6 of defendant's brief that no demand has been made for forty years, is without justification. There is not a syllable in the record to this effect. Furthermore, there have never been forty minutes when the plaintiff could demand the principal sum invested in the estate.

In all of the cases cited by the defendant the actions were upon matured liabilities, therein differing from ground rents. *Terry vs. Anderson*, 95 U. S., 628, was an action based upon the statutory liability of stockholders of a bank to secure the redemption of its bills; *Koshkonong vs. Burton*, 104 U. S., 675, was a suit upon overdue coupons of a municipal bond; and *Turner vs. People*, 168 U. S., 90, and *Timber Co. vs. Roberts*, 177 U. S., 323, involved the application of a New York statute allowing two years in which to redeem certain property sold for taxes, which was not to become operative for six months.

The defendant suggests that under the plaintiff's reasoning interest could be recovered on a debt which had been barred, because theretofore there had been no right to demand the interest. The learned counsel has forgotten that interest is but a penalty for delay in payment. If the principal is barred, so is the incident-interest, and no penalty is levied.

It is a very different proposition to argue that because some coupons of a non-matured obligation are barred, that you can bar others not due or divest the estate.

On page 8 the defendant says:—

"Non-payment of interest may be taken as strong evidence of the extinguishment of the principal. \* \* \* At any rate, it is an attitude which may be declared, in the exercise of legislative discretion, to be inconsistent with the non-extinguishment of the ground rent."

The defendant states this proposition as if it involved the point in issue. The record discloses that the plaintiff at the trial

contended that the Act merely raised a rebuttable presumption and offered to prove affirmatively the non-extinguishment of this rent by payment, but the offer was overruled. The above-mentioned statement is not the doctrine enunciated in *Biddle vs. Hooven*, 120 Pa., 221.

The defendant, on page 8, expresses anxiety lest two hundred and ten years will not bar the remedy and thereby "the Statute of Limitations be avoided." The plaintiff suggests that the defendant, or any of his predecessors in title, could have protected any alleged rights by severing the tenancy and holding adversely for twenty-one years under the Pennsylvania Act of 26th March, 1785; 2 Sm. L., 299, section 2. Until he has discharged his obligation honestly, let him have no thought about the property right subsisting.

At the bottom of page 8 the defendant contends that the legislature can "say to the owner of the ground rent that he must, within twenty-one years, make demand of interest, or it will be conclusively presumed that he had no right to interest, because of the payment of principal." Because some installments of a contract are barred, can it be conclusively presumed that there has been a release before a day of maturity? Can a bar of the plaintiff's right be predicated upon the default of the defendant? The covenant in the deed excuses demand. *Ingersoll vs. Sargeant*, 1 Wharton, 336; *St. Mary's Church vs. Miles*, 1 Wharton, 229.

There is no warrant in the record for the statement on page 9, of defendant's brief that it is highly probable that the *terre-tenant* of this property extinguished this rent, possibly forty-eight years ago, by the payment of \$1200. This assertion is made in spite of the fact that plaintiff's offer affirmatively to prove non-payment was overruled in the court below, raising a question which cannot be argued in this court.

The defendant's paraphrase, on page 11 of his brief, of plaintiff's contention, is evasive. Let him add to his second proposition the fact that the estate is not barred. If this is true and if the estate is unimpaired then the barring of some arrears of rent cannot and does not affect the estate. In *Campbell vs. Holt*, 115 U. S., 620, this precise point was ruled.

After an action of debt had been barred the Texas Statute of Limitations was repealed. In holding that the contract was unaffected and that a right of action again accrued, Mr. Justice Miller said, in part (page 629):—

"We can understand a right to enforce the payment of a lawful debt. The Constitution says that no State shall pass any law impairing this obligation. But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law because its effect is to make him fulfill his honest obligations."

This Act can hardly be said to be "settled law" when it has been doubted by several of the ablest jurists that ever sat upon the bench, and so vigorously denied by the profession. Mr. Justice Kennedy in *St. Mary's Church vs. Miles*, 1 Wharton, 229 (1835), doubted the constitutionality of such an Act should it be adopted; Justice Sharswood did the same in *Haines' Appeal*, 73 Pa., 169, 173 (1873); and the same can be said of Judge Hare in *Hillerman vs. Ingersoll*, 5 Phila. Reports, 143, 144 (1863). Richard M. Cadwalader, Esq., in his "Law of Ground Rents in Pennsylvania," pages 323-333, condemns the Act; he further vigorously assails it in two articles in *The American Law Register and Review* (published in Philadelphia by the Law Department of the University of Pennsylvania), the first being entitled "*Biddle vs. Hooven*," and appearing in the issue for September, 1896, page 557, vol. XXXV., N. S., No. 9, and the second entitled: "*Unconstitutional Legislation Upon the Extinguishment of Ground Rents*," and appearing in the January, 1898, issue, page 13, vol. XXXVII., N. S., No. 1.

Furthermore, the Act has never been accepted by the profession; witness the many times it has been assailed in the Appellate Court: *Korn vs. Browne*, 64 Pa., 55 (1870); *Biddle vs. Hooven*, 120 Pa., 221 (1888); *Wallace vs. Church*, 152 Pa., 258 (1893); and this case, *Clay vs. Iseminger*, 187 Pa.,

108 (1898), and the same case again appealed, and reported in 190 Pa., 580 (1899); and *Clay vs. McCreanor*, 9 Pa. Sup. Ct., 433 (1899).

The defendant argues *dehors* the record when he states, on page 11 of his brief: "Thousands of titles have been accepted on the faith of its enforcement and constitutionality." If we may be similarly indulged in argument, we beg to deny this unsupported statement, at least as to rents reserved before 1855. The title companies in Philadelphia refuse to insure against these ground rents. They will protect the grantee from loss if an extra premium is paid and counter indemnity given. Unless these features are present, we know of no case where a full price has been paid for such a title.

GEORGE HENDERSON,  
*For Plaintiff in Error.*

